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DONALD C. BREY

2009 JAN -6 A 9 38

January 5, 2009

VIA FEDERAL EXPRESS & FACSIMILE (at 202-219-3923)

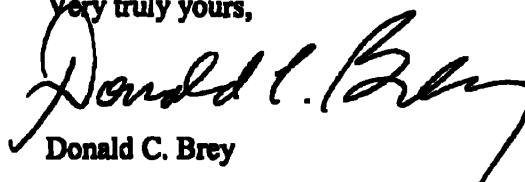
Jeff S. Jordan, Esq.  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

Re: MUR 6126

Dear Mr. Jordan,

Enclosed is the Republican Senate Campaign Committee's and J. Matthew Yuskewich's Response to the Complaint in MUR 6126.

Very truly yours,

  
Donald C. Brey

DCB/a

Enc.

ND: 4849-5848-9603, v. 1

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**FEDERAL ELECTIONS COMMISSION**

Office of General Counsel  
999 E Street, NW  
Washington, D.C. 20463

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RE-ELECT CONGRESSMAN  
KUCINICH COMMITTEE,

Complainant,

v.

REPUBLICAN SENATE CAMPAIGN  
COMMITTEE, et al.,

Respondents.

MUR No. 6126

**RESPONSE TO COMPLAINT**

The Republican Senate Campaign Committee and J. Matthew Yuskewich, its Treasurer, had no duty to file a Form 9 because:

1. Respondents are exempt under 11 CFR §100.29(c)(5); and,
2. Respondents did not spend over \$10,000 on electioneering communications.

**I. RESPONDENTS ARE EXEMPT UNDER 11 CFR §100.29(c)(5).**

11 CFR §100.29(c)(5) states that certain "communications are exempt from the definition of electioneering communication" including "[a]ny communication that . . . [i]s paid for by a candidate for State or local office in connection with an election to State or local office, provided that the communication does not promote, support, attack or oppose any Federal candidate."

**A. The Communication Neither Supported Nor Opposed A Federal Candidate.**

A cursory examination of the advertisement at issue shows that it does not "promote, support, attack or oppose any Federal candidate". For less than one second of the thirty second advertisement, a photograph of Dennis Kucinich appears as Dennis Kucinich's name is spoken

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orally in a portion of the statement "Oh Brother, Dennis Kucinich's brother Gary is running for State Senate." Dennis Kucinich's photograph is then immediately covered up by a photograph of Gary Kucinich which appears on screen for most of the rest of the advertisement. The advertisement makes no reference to Dennis Kucinich's status as a candidate for Congress and says nothing of any relevance to Dennis Kucinich's campaign for re-election to Congress.

Identifying Gary Kucinich as Dennis Kucinich's brother served to educate the voters that they were two different people. Dennis Kucinich had previously served as State Senator in the district his brother Gary Kucinich was running for in 2008. Dennis Kucinich had also previously served as Mayor of Cleveland, as Congressman, and as a candidate for President. Dennis Kucinich's Congressional District overlapped with the Ohio Senate District in which his brother Gary Kucinich was running. Gary Kucinich's prior experience in public office was far more limited, but Gary Kucinich shared his last name with his more famous brother. Informing voters that Dennis Kucinich and Gary Kucinich were different people did "not promote, support, attack or oppose any Federal candidate".

**B. The Communication was by a State Candidate for a State Office.**

Under Ohio law, the expenditure for the "Oh Brother" advertisement constituted an in-kind contribution to the candidate and "an expenditure by the candidate". Ohio Rev. Code §3317.01(B)(17).

The Republican Senate Campaign Committee is a "legislative campaign fund" as defined under Ohio law. Ohio Rev. Code §3517.10(D)(3)(d) describes a legislative campaign fund as follows:

Each state political party shall have only one legislative campaign fund for each house of the general assembly. Each such fund shall be separate from any other funds or accounts of that state party. A legislative campaign fund is authorized to receive contributions

and make expenditures for the primary purpose of furthering the election of candidates who are members of that political party to the house of the general assembly with which that legislative campaign fund is associated. Each legislative campaign fund shall be administered and controlled in a manner designated by the caucus. . . .

In other words, the Republican Senate Campaign Committee is operated for the benefit of state and local candidates for election as Republican members of the Ohio Senate. In 2008, one of those candidates was State Senator Thomas F. Patton, Gary Kucinich's opponent in the November 4, 2008, general election for State Senator from Ohio's 24<sup>th</sup> State Senate District.

The Republican Senate Campaign Committee operates exclusively in support of Ohio state or local candidates. The Republican Senate Campaign Committee does not make contributions to any federal candidates, and is prohibited by Ohio law from doing so. Ohio Rev. Code §3517.102(B)(6)(d) states, "[n]o legislative campaign fund shall make a contribution, other than to a designated state campaign committee or to the state candidate fund of a political party."

All of the contributions and expenditures of the Republican Senate Campaign Committee are reported to Ohio's Secretary of State and are available for public review on the Secretary of State's website. The Republican Senate Campaign Committee properly reported the amounts spent on the "Oh Brother" advertisements (and on other advertisements) as in-kind contributions to Senator Thomas Patton's campaign committee, "Friends of Tom Patton" in the campaign finance reports it filed with Ohio's Secretary of State. Senator Patton authorized the Republican State Campaign Committee to act on his behalf and these expenditures were made "with the consent of, in coordination, cooperation, or consultation with, or at the request or suggestion of" the state candidate, Senator Patton.

Ohio Rev. Code §3517.01(B)(16) states, in part:

**"In-kind contribution" means anything of value other than money that is used to influence the results of an election or is transferred to or used in support of or in opposition to a candidate, campaign committee, legislative campaign fund, political party, political action committee, or political contributing entity *and that is made with the consent of, in coordination, cooperation, or consultation with, or at the request or suggestion of the benefited candidate*, committee, fund, party, or entity. [Emphasis added.]**

Under Ohio law, these in-kind expenditures constituted expenditures by the State Senate

Candidate Tom Patton. Ohio Rev. Code §3517.01(B)(16) goes on to state:

**The financing of the dissemination, distribution, or republication, in whole or part, of any broadcast or of any written, graphic, or other form of campaign materials prepared by the candidate, the candidate's campaign committee, or their authorized agents is an in-kind contribution to the candidate and *an expenditure by the candidate*. [Emphasis added.]**

Since the advertisement at issue neither promoted, supported, attacked nor opposed Dennis Kucinich (or any other federal candidate) and since the expenditure for the advertisement constituted an expenditure by a state or local candidate (State Senator Patton) in connection with an election to state or local office, the advertisement at issue is exempt under 11 CFR §100.29(c)(5). For this reason alone, the Complaint should be dismissed.

## **II. Respondents Did Not Spend Over \$10,000 For Electioneering Communications**

Less than one second of the 30 second advertisement contains the name and photograph of Dennis Kucinich (in the phrase "Dennis Kucinich's brother Gary is running for State Senate"). Even assuming, for the sake of argument, that this brief name and visual portrayal of Dennis Kucinich would otherwise be an electioneering communication, plainly the other 29 seconds of the advertisement do not contain electioneering communications.

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2 USC §434(f)(4) states that there is no duty to file a disclosure with the FEC unless and until in a given calendar year "a person has made disbursements for the direct costs of producing or airing electioneering communications aggregating in excess of \$10,000". Television time is charged based on the time used. Thus, the "direct costs" of airing the name and photograph of Dennis Kucinich is 1/30<sup>th</sup> of the total cost of airing the full advertisement. Since, even according to the Complaint, the Republican Senate Campaign Committee spent far less than \$300,000 to air this advertisement, the \$10,000 threshold for disclosure was never met.

Both federal and state laws reflect the view that television advertisements are attributed to candidates in proportion to the time devoted to each candidate. 11 CFR §106.1(a) states, in part:

Expenditures, including in-kind contributions, independent expenditures, and coordinated expenditures made on behalf of more than one clearly identified Federal candidate shall be attributed to each such candidate according to the benefit reasonably expected to be derived. For example, in the case of a publication or broadcast communication, the attribution shall be determined by the proportion of space or time devoted to each candidate as compared to the total space or time devoted to all candidates.

Ohio Adm. Code §111-5-16, similarly, states, in part:

Expenditures including in-kind contributions and independent expenditures made on behalf of more than one clearly identified candidate shall be attributed to each such candidate according to the benefit reasonably expected to be derived. For example, in the case of a publication or broadcast communication, the attribution shall be determined by the proportion of space or time devoted to each candidate as compared to the total space or time devoted to all candidates.

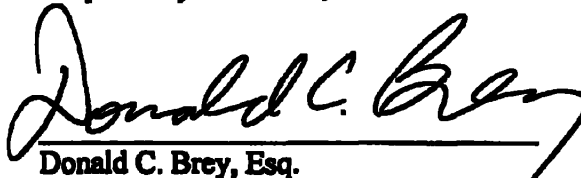
While the advertisement at issue contained *no* electioneering communications supporting or opposing Dennis Kucinich, the proportion of the advertisement that even mentioned Dennis Kucinich was merely 1/30<sup>th</sup> of the advertisement. Even assuming, for the sake of argument, that

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this brief mention of Dennis Kucinich could possibly constitute an electioneering communication, 1/30<sup>th</sup> of the total amount spent for the advertisement in question would not reach the \$10,000 threshold for filing FEC Form 9.

WHEREFORE, Respondents Republican Senate Campaign Committee and J. Matthew Yuskewich respectfully submit that the Complaint against them should be dismissed.

Respectfully submitted,

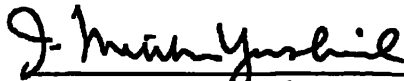


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Counsel for Respondents

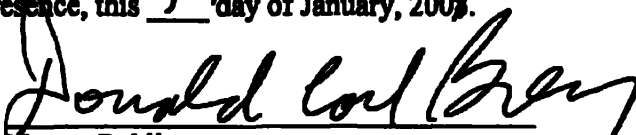
**VERIFICATION**

J. Matthew Yuskewich, being first duly sworn, states that he has reviewed this Response and that the factual statements contained in it are true based upon his knowledge, information and belief.



J. Matthew Yuskewich, Treasurer  
Republican Senate Campaign Committee

Sworn to before me and subscribed in my presence, this 5<sup>th</sup> day of January, 2008.



Notary Public

DONALD CARL BREY, ATTORNEY AT LAW  
NOTARY PUBLIC, STATE OF OHIO  
My Commission Expires 06/30/2010